

Revised September 3, 2002
U.S. ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT

INSTRUCTIONS FOR USING
THE MODEL DECLARATION OF COVENANTS AND RESTRICTIONS
WITH PERMIT APPLICATIONS UNDER SECTION 404 OF THE CLEAN WATER
ACT AND SECTION 10 OF THE RIVERS & HARBORS ACT OF 1899

1. COMPENSATORY MITIGATION AND PERMITTING

Prospective applicants for permits from the U.S. Army Corps of Engineers, (USACE), Savannah District, Regulatory Branch under Section 404 of the Clean Water Act, (33 U.S.C. 1344) may decide to perform what is known as "compensatory mitigation" in return for unavoidable impacts to waters of the United States including wetlands due to the activities or work authorized by a permit. The compensatory mitigation may include preservation, restoration, enhancement or creation of wetlands or streams and buffer areas. In order to provide perpetual protection of the mitigation property, a Declaration of Covenants and Restrictions is required, whereby the owner of the property places permanent conservation restrictions on identified mitigation property containing jurisdictional waters of the United States including wetlands, wetland buffers, upland, streams and streamside buffers as well as possibly some non-jurisdictional wetlands where the USACE accepts the non-jurisdictional wetlands as mitigation. The restrictive covenant is also used with applicants for banking instruments and with enforcement action settlement agreements.

These conservation restrictions significantly limit the property's future use. In effect, it limits any future development of the property that is subject to the restrictions and requires that the land be held and managed for its conservation functions in perpetuity. The owner of the property should determine federal, state and county tax consequences, if any, prior to commitment to this Declaration. Declarations of Covenants and Restrictions and exhibits must be approved by the USACE Office of Counsel prior to the recordation of the documents in the land records office with the Clerk of the Superior Court in the county in which the land lies.

Other types of compensatory mitigation which may be selected include acquisition of credits from a permitted wetland or streamside lands mitigation bank and/or payment of an in lieu fee to the Georgia Land Trust Service Center in Athens, Georgia. The Savannah District web site provides additional information on banks and payment of in lieu fee to land trusts.

2. WEB SITE

The Declaration of Covenants and Restrictions draft model and instructions are located on the Savannah District web site at www.sas.usace.army.mil. Select the yellow box titled, "Permitting Info." Under the bold paragraph title, "Savannah District Regulatory Publications," scroll down to the document titled, "Declaration of Covenants and Restrictions." The file is offered in two formats, PDF format and Microsoft format. The Microsoft formatted file can be saved and used to draft the document by deleting the instructions and filling in the required information.

3. THE APPLICANT AND OWNER OF LAND MUST BE THE SAME

The applicant for a (permit, banking instrument or enforcement action settlement agreement) is required to have fee simple title to the property being proposed for compensatory mitigation prior to the recording of a Declaration of Covenants and Restrictions.

4. CONSERVATION EASEMENT

The Declaration of Covenants and Restrictions is not intended for use with conservation easements. See guidance on conservation easements on the Savannah District web site in the same location as the Declarations of Covenants and Restrictions draft document referenced above under “Web Site.”

5. ATTORNEY

A Declaration of Covenants and Restrictions is a legal document and must be prepared by, or at a minimum, reviewed by an **attorney** prior to submittal for review by the Office of Counsel, Savannah District.

6. DEED TO SECURE THE DEBT

If there is a deed to secure a debt, the attorney should prepare a Consent and Joinder whereby the holder of the deed to secure the debt agrees to subrogate their interest in the property to that of the restrictive covenant terms and conditions. The Consent and Joinder document should reference the recorded location of the deed to secure the debt and have the consent and joinder statement signed by the appropriate official of the financing institution or by the debt holder.

7. CERTIFICATE OF CORPORATE AUTHORITY

A certificate of corporate authority should be provided to Office of Counsel along with the name and mailing address of the agent for the corporation listed with the Georgia Secretary of State.

8. RESIDENTIAL DEVELOPMENT

The Corps of Engineers considers compensatory mitigation on-site in a proposed residential development. However, only wetlands, wetland buffer, streams or streamside lands proposed for placement in an open or common area to be held as common property will be considered for purposes of restriction by a Declaration of Covenants and Restrictions. This open or common property is generally owned by the developer and subsequently conveyed to a homeowners association. The language in any Declaration of Covenants and Restrictions for a residential development establishing a homeowners association should address the responsibilities of the homeowners for the financial and legal responsibilities associated with long-term management of the common property. Open or common area property will not be considered for placement in a covenant if residential lots have been sold prior to the recording of the Declaration of Covenants and Restrictions required by the Clean Water Act Section 404 permit, since the intent is to have the restrictive covenant in the chain of title of all future lot owners within the residential development.

9. COMMERCIAL OR INDUSTRIAL DEVELOPMENT

On property developed as commercial, industrial or mixed-use development, the Corps of Engineers considers compensatory mitigation on-site for proposed projects. However restrictive covenants will only be considered where the restricted property is set aside as a separate lot or common property to be separately managed and not made a part of multiple lots to be developed. The intent is that there be one legal entity responsible for the property addressed by the restrictive covenant. Provisions for long-term management of the restricted property should be addressed in the mitigation plan and in the Declaration. Following the recording of the restrictive covenant, the restricted property may be conveyed to an environmental land trust or governmental entity for long term management and for use as green space. If credit for the conveyance is requested from the USACE, the web site addressing conservation easements should be reviewed to determine qualification.

10. SPECIFICATION OF ECOLOGICAL FUNCTIONS

There should be a short summary recital of the existing and/or proposed natural, scenic, open space, aquatic, riparian, biological and ecological functions of the property proposed for placement in a Declaration of Covenants and Restrictions. Generally a mitigation plan addresses the ecology.

As to preservation mitigation lands, provide a summary ecological description of the aquatic, vegetative, forested, animal and general wildlife habitat, and the hydrological and/or riparian system. As to restoration, enhancement and creation mitigation land, provide the proposed aquatic, vegetative, and/or riparian ecology and state the expected benefits to the ecological function of the property.

Provide a description of the aquatic site whether riverine, forested, freshwater adjacent to tidal area, isolated, pine flatwood, lake, or otherwise. Describe the vegetation and state whether it is planted or natural or both. State any other conservation functions. Discuss the benefit of any upland, wetland buffer, or streamside lands to the ecology of the site. Address the biological integrity of the land in the vicinity. Summarize the above information and insert in the restrictive covenant. To the extent the above information is discussed in full in an executive summary of the mitigation plan and is five pages or less, it may be attached as an exhibit.

This summary of the ecology is an exhibit to the restrictive covenant.

11. SURVEYS

See instruction page for surveyors infra at page 6.

12. EASEMENTS ON OR ACROSS THE PROPERTY

Provide copies of easements of record and show location of easements on the platted survey.

13. APPROVAL PRIOR TO RECORDING

A draft of the Declaration of Covenants and Restrictions with exhibits should be forwarded to the Corps of Engineers Office of Counsel with a cover letter providing name, telephone and address of the applicant's attorney as the point of contact. Forward draft restrictive covenants and exhibits to Rebecca Rowden, Assistant District Counsel, Office of Counsel, Corps of Engineers, 100 West Oglethorpe Ave., Savannah, Georgia 31402-0889. (Telephone Number 912-652-5123). Consultations with the Office of Counsel in Savannah, Georgia can be requested to review and discuss draft documents. Allow two to three weeks for final review and comment.

Once approved, a letter will be forwarded to the attorney with directions for recording. At such time as the attorney receives a copy of the recorded document from the clerk's office, a copy should be forwarded to the Office of Counsel. When the Office of Counsel receives a copy of the recorded restrictive covenant, the restrictive covenant requirement portion of the permit or banking instrument will be completed. All correspondence should reference the USACE permit number, enforcement action number or banking instrument number, as that is the manner in which it is filed and referenced. This number is referenced on all correspondence from the USACE Regulatory Branch.

14. AMENDMENTS

Proposed amendments to recorded restrictive covenants must be pre-approved by the USACE. Amendments will be considered only in exceptional circumstances. Clean Water Act permits were issued in consideration of the preservation, restoration, enhancement and creation of waters of the United States to offset any loss of jurisdictional waters. A condition of the permit was the requirement that these waters, along with their protective buffers, be protected in perpetuity. Applications to impact the protected property may require an individual permit application. The permit application should address alternatives to impact of the protected property site in order to consider whether impact of the protected property is the least environmentally damaging alternative.

Proposed amendments to recorded restrictive covenants will be forwarded for interagency review and/or review by the mitigation banking review team, and will go out on Joint Public Notice as a separate notice from the permit application.

(a) Owners of the restricted property

If the owner of the property records a Declaration of Covenants and Restrictions as a condition of a Clean Water Act Section 404 permit, and subsequently an owner of the property submits a request for a modification to the permit for purposes of impact to the property protected by the Declaration of Covenants and Restrictions, a Joint Public Notice (JPN) will be issued.

The JPN will contain information addressing the fact that the modification proposes to impact property required as mitigation on a previous permit and protected by a recorded Declaration of Covenants and Restrictions. The JPN will further state the applicant's position as to why the impact is unavoidable. The proposal to impact the restricted lands should not be submitted based on financial hardship or benefit, or due to design concerns or growth pattern in the area in that those factors were already considered at the time the owner of the property agreed to the terms of the restrictive covenant. The fact that the proposed impact is not to wetland, but to wetland buffer or upland associated with a wetland or stream, or to property not considered jurisdictional waters of the United States, should not be assumed to be an insignificant impact to lands protected by the Declaration of Covenants and Restrictions for their conservation value.

A determination may be made that the proposed impact substantially reduces the value and function of the waters of the United States on the entire tract, even though the actual impact is to a portion of the waters of the United States. Mitigation for impacts to an area protected by the covenant may be subject to a significantly higher impact mitigation ratio than the standard operating procedure and generally begin at a two to one ratio.

(b) Where the applicant does not own the restricted property

Where an applicant for a new permit proposes impacts to protected property after conducting an alternatives analysis, and where the applicant is not the owner of the property subject to the terms of a Declaration of Covenants and Restrictions, the applicant should first contact the owner of the property

to determine if the owner agrees to proposed impacts and required mitigation. Modification of permits for the purpose of impacting property restricted by Declaration of Covenants and Restrictions will not be considered due to financial hardship or benefit, design concerns, or to growth in the area in that those factors were considered at the time of the issuance of the permit and subsequent recording of the restrictive covenant.

If the application to amend the restrictive covenant goes forward, a Joint Public Notice (JPN) will be issued. The JPN will contain information addressing the fact that the project proposes to impact property required as mitigation on a previous permit and protected by a Declaration of Covenants and Restrictions. The JPN will further state the applicant's position as to why the impact is unavoidable. The fact that the proposed impact is not to wetland, but to wetland and stream buffers and/or uplands should not be assumed to be an insignificant impact. In addition, non-jurisdictional wetlands are equally protected by the restrictive covenant in that their value was taken into consideration at time of issuance of the permit.

A determination may be made by the Corps of Engineers that the proposed impact substantially reduces the value and function of the wetlands on the entire tract rather than just on the actual acreage proposed to be impacted. Mitigation for impacts to an area protected by the covenant may be subject to a significantly higher impact mitigation ratio than the standard operating procedure and generally begin at a two to one ratio.

(c) Condemnation authority - Governmental Entities

Governmental entities considering the exercise of condemnation authority should give consideration to the protected status of property protected in a Declaration of Covenants and Restrictions. If the governmental entity is also applying for a permit pursuant to the Clean Water Act, Section 404, the alternatives analysis should discuss alternatives considered in the determination to impact the protected property.

If the property is taken, in whole or in part, by exercise of the power of eminent domain, the governmental entity shall be subject to replacement mitigation required by the US Army Corps of Engineers subject to the Clean Water Act, Section 404 and its implementing regulations. The fact that the impact proposed is not to wetland or streams, but to buffer or upland, should not be viewed as an insignificant impact. In addition, non-jurisdictional wetlands protected by the restrictive covenant are equally protected by the restrictive covenant as having mitigation value. A determination may be made that the proposed impact will substantially reduce or destroy the functions and values of wetlands in the restricted property in part or in whole.

Mitigation for impacts to the property protected by the restrictive covenant may be subject to a significantly higher impact mitigation ratio than the standard operating procedures and will be in addition to the mitigation considered on any new permit application. The mitigation generally begins at a two to one ratio.

(d) Preparation of Documents

If an amendment to, or an extinguishment of, the restrictive covenant is granted, the attorney for the owner of the property will be required to prepare the document. It should be forwarded to the Office of Counsel for review prior to recording.

PROVIDE THIS PAGE TO SURVEYOR

Surveys must contain the seal of a Georgia Registered Land Surveyor. The surveyor should determine the survey plat size required by the land records office in the Office of the Clerk of the Superior Court in the county where the property is located. All bearings and distances and coordinate values on the survey should be large enough to be clearly seen. If the survey consists of more than one drawing, reference the number of pages of drawings.

The boundary survey for use with the Declaration of Covenants and Restrictions is the bearings and distances of the property that will be subject to the Declaration of Covenants and Restrictions and generally includes wetlands, buffer to wetland, buffer to stream and streams. It may also include some non-jurisdictional wetlands and boundaries. This survey is not the same survey as conducted for a delineation of jurisdictional waters of the United States but may contain much of the same property if the mitigation is onsite. A legend should be provided on the survey drawing to indicate that approximate portion of property within the boundary survey that is considered wetland, stream and buffer. The survey may also show the location of wetlands and streams that are authorized by the terms of the permit to be impacted.

A survey plat should show:

A. Bearings & distances, and coordinate values of the wetland and any wetland buffer, upland or streamside property that is the subject of the Declaration of Covenants and Restrictions.

B. The bearings & distances should be tied in to at least one known coordinate, with a statement of precision closure $< 1:10,000$. Use NAD 1983 DATUM.

C. Use a legend to identify the wetlands, wetland buffers, streamside lands, upland or other restricted areas, and state the total number of acres in the restricted tract/s. Provide a vicinity map identifying roads adjacent to the site.

D. Provide a minimum of three or four latitude/longitude coordinates which when connected will form a polygon that approximately circumscribes the mitigation area. This is for use with GIS mapping.

E. Surveyor shall enter "Note" on survey that "Wetlands, Wetland Buffers and/or Streamside Lands may be under the jurisdiction of the U.S. Army Corps of Engineers, permit number _____ and are protected by a recorded Declaration of Covenants and Restrictions." Provide the total number of acres in the tract/s. Provide the U.S. Corps of Engineers permit or action number.

The survey should show existing, permitted or proposed utility or road-crossings and state the type of utility. If the applicant intends to allow public use of the property, show any proposed paths, trails, education center structures, parking area or other proposed use. Show existing structures, roads and towers.

Surveyors should coordinate with the applicant and the applicant's attorney in preparation of this exhibit for the Declaration of Covenants and Restrictions. The attorney should submit the survey at the time the draft restrictive covenant and exhibits are forwarded to the Corps of Engineers. The Corps of Engineers must approve all surveys prior to recording.

